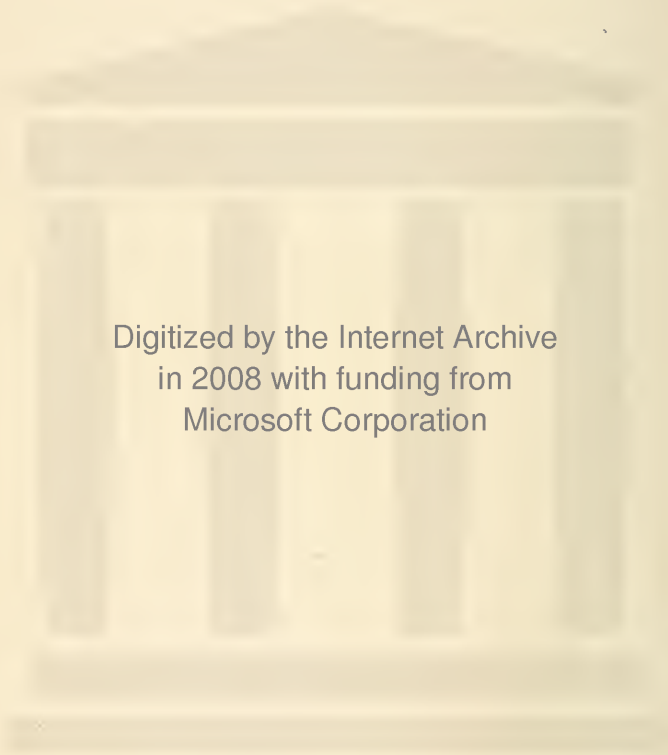

Fifty Cents.

THE CONSTITUTION OF THE UNITED STATES.

THREE LECTURES

DELIVERED BEFORE

THE UNIVERSITY LAW SCHOOL

OF WASHINGTON, D. C.,

BY

MR. ASSOCIATE JUSTICE MILLER,

Of the Supreme Court.

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First Lecture.

It gives me great pleasure, gentlemen, to spend three evenings of the little recess, or holiday, that our court takes from its labors, in communing with gentlemen who are in pursuit of the law. As I had occasion to say to the Bar Association of the city of New York, last fall was a year, when I delivered the address before it, "We are all lawyers, and judges do not cease to be lawyers by becoming judges; in fact, they would be very poor judges if they were not lawyers."

The subject with which I propose to occupy your attention in the three discourses that I shall have the pleasure of delivering before you, is "*The Constitution of the United States.*" I have adopted that subject not because there is anything in it new or fresh to you, or to any other well-read class of gentlemen, but because, owing to my situation on the bench of the Supreme Court of the United States, I have been compelled to give it very close attention, and to look at it in aspects which required the best powers that I had to give.

It is a very remarkable instrument in many particulars. I think I may venture to say that no more important written instrument exists today in the history of the world, as affecting the happiness of the world, outside of those which are of a religious character—perhaps I might say outside of those of a divine origin. It is the subject of perpetual exegesis by all the lawyers of the country and by all the courts of this country,—an immense number of lawyers and courts representing a very large population and very extensive business, all of which are more or less affected by this instrument which we call the Constitution of the United States.

Written Constitutions are not very numerous. Still, there have been societies of men, and States and colonies, which have been governed, in their organic policy, by instruments called charters, granted by kings, or monarchs, or rulers — by whatever style they may have been called — to their subjects, and designed to confer rights and regulate the relations of the subjects to the monarch. This instrument, however, is one which comes from a different source. It is one in which the people themselves have undertaken to frame an organic law governing the relations of the whole people of the

United States, to a very large extent, to the Government of the United States, and the relations of the States to that government, and to prescribe, in very many cases, the limits and rules of private and individual rights. Such an instrument, framed and put into language, judiciously operative upon the affairs which it is intended to govern, is a rare thing in the history of the world; and I think I may, with safety, say that no instrument of such a character, so well adapted to the purposes which it is intended to subserve, and so successful for those purposes, has ever been framed by the ingenuity of man. It is therefore a subject unique in that respect, to which I invite your attention.

This, however, like all other instruments, when it becomes the subject of comment and of construction, must necessarily be looked at in the light of its origin, the purposes which it was intended to subserve, and the evils which it was intended to remedy.

It would be almost enough to occupy an entire course of lectures for any one to attempt to give you a history of the Constitution of the United States.

Probably the best condensed history of it will be found in Mr. Justice Story's preliminary

and introductory chapters to his Commentaries on the Constitution of the United States. I will, however, state to you, in a very few words, that this Constitution arose out of the condition in which the people of the United States found themselves at the close of the Revolutionary War. Having established their independence of the Government of Great Britain, and been recognized as one of the family of nations, they soon found that the compact under which they had achieved successfully that independence, namely, the Articles of Confederation, was utterly inefficient and incompetent to answer the purpose of binding them together and conducting the new nation on its pathway to future usefulness. Its defects were obvious, and some of them you have no doubt heard before. It was found that the Colonies, as they had been previously called, had never really been independent States or Nations. They had been subjects of Great Britain, controlled by charters of the King of England, submitting very largely to the legislation of the Imperial Parliament, until certain questions connected with taxation caused a resistance, not to the King, but to the laws of Parliament.

In the effort at resistance, they had united to-

gether in a body to make that resistance successful; so that being a government or a nation when they were free, each individual colony had never been at any time a separate and independent State, and yet neither of them recognized any supremacy in any other State; and the question was, what amount of supremacy should they grant or yield to the common government which they were about to form. It was found that that which had carried them through the war in the paroxysm of patriotism necessary for self-defense, was incapable for carrying on a successful government after that impulse was gone.

One of the evils which was most pressing, to be remedied by this new organization or reorganization of the government, was that no taxes could be successfully collected for the support of the general government. The only reliance during the Revolutionary War, and from 1776 up to 1789, when this government was organized, was a call, or request, by the Federal authority upon the States for their proportion of the taxes necessary to support the government. Even during the pendency of the war, this was responded to very feebly and very unequally; and hence the war of the Revolution was fought

on credit, and an immense debt remained to be paid at its close. There was no means of relief in taxing the people by the parent government.

Another evil was, that, coming to be recognized as one of the nations of the earth, this so-called central or general government had no sufficient powers, conceded to it by the States, to conduct its affairs with foreign governments. We had no capacity to make treaties except on a limited class of subjects. We had no means to raise armies and navies, or of paying the government debt; and how far each State could itself negotiate with other nations, and how soon we should be subjected, as the Grecian republics were in the days of the Olympic councils, to the influence of other nations who might approach any one of the States to withdraw it from the Union, nobody could tell.

But perhaps of all the causes,—like some little fretful thing that seems unimportant, but which perpetually annoys you,—of all the causes which contributed most largely to the formation of the new Constitution, was the condition of trade and commerce abroad, and trade and commerce between the States. The power of taxing all the

goods that passed through each State and every port remained with the States. The little State of Rhode Island was mistress of the finest and most extensive harbor or port in the United States at that time—the harbor of Newport. All the goods nearly that went to the large cities of New York and Boston—the foreign goods that supplied the markets of New England and New York—nearly all of them—were imported through Newport; and that little State levied taxes on their importations at her own pleasure. She was getting rich at the expense of her neighbors and confederates, in what was then nothing more than a confederacy. And one result and evidence of that will be found in a thing which perhaps you will all remember, that the State of Rhode Island was the last State which assented to the Federal Constitution, and that she did not give that assent until three years after it was promulgated. That was the reason. She was living on the commerce of the whole country and enriching her citizens at the expense of those of the other States. The port of Charleston did the same thing with reference to the southern country—Georgia and North Carolina. The port of Norfolk did the same thing with reference to Virginia and Maryland; and I am

not certain but our neighboring town of Alexandria did the same thing with reference to some portion of Virginia and Maryland.

But that was not all. The trade between the States was taxed heavily, and this was one of the most difficult things to correct, and has been most persistently pursued up to the present hour. Notwithstanding for nearly one hundred years we have had, in the instrument of which I am speaking to you, the declaration that Congress shall have power to regulate the commerce with foreign nations and among the several States, there are to this hour, upon the statute-books of almost every State, laws violating that provision; and if that provision of the Constitution were removed to-morrow, this Union would fall to pieces, simply by the struggles of each State to make the property owned in other States pay its expenses. Within two weeks we have had before the Supreme Court three cases in which that point has come up (and we will have several more of them). One of them was from Pennsylvania, in which I had the honor to deliver the opinion of the court, in which that State declared that auctioneers should pay a license-tax of such a percentage upon their sales of all goods *not produced in the State of Pennsylvania;* which you

see at once is a discrimination and a tax upon all goods, sold at auction, produced in sister States. And it is not long since we had a case coming from the city of St. Louis, where an ordinance of that city, authorized by the State of Missouri, imposed a tax upon all peddlers except those who sold goods produced in the State. And the thing is infinite. We have now pending before us, and undecided, a question that was argued a month ago, in which the city of Baltimore, authorized by a statute of the State of Maryland, imposed a wharfage-duty upon all produce landing at a wharf of the city, other than the produce of the State of Maryland; so that the fish and other produce of Virginia, Pennsylvania, and other States, had to pay a tax for landing, while the produce of Maryland had none.*

It was this tendency of each State to make a grabbing business of supporting its government out of taxes upon the property of other States, or on the produce which must go through one State to another, that more than any other compelled the formation of the present Constitution.

Now, the importance of understanding this fact as one of the reasons for forming the Constitu-

*The court has since decided the law to be unconstitutional.

tion, is quite apparent. A key to the construction of a statute or a Constitution, is to inquire what was the evil to be removed, and what remedy did the Constitution propose; so that when any of these questions come up, requiring judicial construction of a clause of the Constitution, we go back to ascertain the evil that was intended to be remedied.

The Articles of Confederation were a rope of sand; the nation was only a nation in name; and when the framers of the Constitution came to their work with a full view of the importance of it and of the evils to be remedied, they declared that this instrument which they framed was no longer to be a rope of sand, but that they were framing an instrument and instituting a government for common defense and general welfare; and they used language no longer speaking for the States individually, who might struggle with each other, but they said: "We, the people of the United States, do ordain this instrument to be our Constitution." It was then that a nation was born.

Of course, when these delegates all came together, they must have had among them a great deal of the philosophy of government. Probably no nation or people, as young as ours then was,

ever had as many men thoroughly versed in that philosophy—as many men who had given vigorous attention, educated and trained attention, to the science of government, as were to be found in the United States at the time this instrument was to be made. And, fortunately, society was in a condition when personal aspirations and malign influences were not brought to bear—probably could not be brought to bear, from the fact of the wisest and best men being sent forward to make that Constitution. In that we have reaped the benefit of the good fortune of our ancestors.

In considering the forms of government, we find that there are three primary forms: the monarchy, the aristocracy, and the democracy. I am not here to tell you what a monarchy is, or what either of these is. You know that a monarchy, pure and simple, is the despotic government of one man. An aristocracy is perhaps less despotic, but clearly arbitrary—a government of the leading men or spirits of a country, whether they be gentlemen or hereditary noblemen—not one, but many—but still professing to act by the power of the people; a beneficial power and influence, acquired either by inheritance or by conquest; and this is called an aristocracy. A democracy, pure and simple, is said to be a govern-

ment by all the people. There have been very few of these governmental forms, simple and pure, in the history of the world; perhaps in regard to monarchy there have been, and possibly always will be, monarchs who are absolute, at least who are limited by no acknowledged restraint on their authority. In regard to aristocracies, they have been but few; and probably the Venetian government, which was carried on with great prosperity for three or four hundred years by a set of hereditary nobles and successful merchants, was the purest example of aristocracy that the world has ever seen. England was, a century ago, more of an aristocracy than anything else. But a pure democracy is almost unknown, from the difficulty of having all the people participate in the functions of the government; because these functions not only require the processes of government, but they include the process of making laws and the process of administering those laws. Such was the democracy of Athens, probably the only highly-civilized form of democracy that ever existed—a government in which the common people, from the streets and everywhere, met and decided lawsuits. Questions of the right of property; questions of life and death of the individ-

nal; questions of banishment and censure of their officers; questions of the proprietorship of land; questions of the election of the chief officers; questions of making war and peace,—all were submitted in that democracy to the people that could gather together in the public buildings of that little city of Athens. But those of you who have read its history know that it was a perpetual scene of turmoil; how little security there was for life when they made their best men drink the hemlock, and banished their best generals for a year and perhaps for life. While it stimulated the intellect of that race and made them prize human effort directed in channels of imagination, of science, and of literature, it still was far from being a place where personal rights were respected, and where any man of modern times would be willing to make a home.

But our forefathers, when they got together, did not adopt either of these forms, though it is common to say that ours is a government of the democracy. In the true sense of a democracy, by which all the acts of the government are performed by all the people, it is about as far from a democracy as any other civilized government that we know of. But they determined that the people should be felt, and they made what

we call a composite government—a representative republican government—a government in which the powers that belong to all sovereignties were divided and placed in different depositories; and the question of that division was one of very great interest. The proper division of these powers has since come to be recognized and assigned in all good governments, and that division is into the executive, legislative, and judicial branches or departments. By executive, is meant the branch which enforces the law; by legislative, is meant the branch which enacts the law; and by judicial, is meant the branch which administers the law, as regards both public and private rights, as between the citizens themselves and between the citizens and the government, You will observe, however, in this Constitution. that the lines which mark that division are not perfect. Perhaps it is impossible that they should be perfect. Perhaps it is desirable that they should be more perfect than they are. As regards the executive branch of the government, for instance, that was not completely vested in the President; for we find that the Senate was required to give its assent to all treaties made by the President before they were valid. The Senate is also required to confirm all higher nomina-

tions to office before they become valid appointments. So that these two great functions, which are usually classed as executive functions of the government,—appointment to office and making treaties,—are divided, to some extent, in their responsibility and in the forms necessary to give them efficacy, between the President of the United States, who is the executive, and the Senate of the United States, which is one of the branches of the legislative department.

So, also, declaring war and making peace, which in all other respects is held to be an exclusively executive function, and which in the popular government of England remains in the Crown alone—the Crown recently having declared war without asking Parliament and having made peace in the same manner, and that being the common form of doing the thing—is a function in which the executive and legislative branches of our government participate. The Constitution of the United States says that Congress shall have power to declare war; and the President takes part in that matter only as he is part of the legislative branch. So when you come to the legislative branch of the government, you will find that that is not separate from the executive, because our laws require

that they shall be signed by the President. He thus becomes an important part of the legislative department of the government; and if he does not choose to sign them he usually sends them back with his reasons and objections, which is commonly called the veto, and it then requires two-thirds of the legislative houses to enact them into laws over that veto. So that the legislative power is not confided wholly to the legislative branch.

Perhaps the judicial power is more nearly left perfect in the hands of the judiciary than any other, but not wholly so; for the power of framing impeachments and trying them, which is eminently a judicial function—as much so as it is to indict a man and try him for murder—we find belongs wholly and exclusively to the two branches of the legislative department. The House of Representatives finds the impeachment, and the Senate tries it.

But, after all, those are only exceptions; and it remains true, that for general purposes, and very useful purposes, the best feature of this Constitution is that it does make this substantial separation of power among these three departments.

These departments, under our form of gov-

ernment, are co-ordinate in dignity. Neither of them is intended, by the theory of our Constitution, to be subjected to the other. The President cannot be compelled to make a treaty or appoint anybody to office that he does not want to. The legislature cannot be compelled to pass any laws, and the legislature alone can pass laws. The judiciary alone can construe the laws and enforce the laws by judgments of the courts. In the case of Dodge *v.* Woolsey, in 18 Howard, Mr. Justice Wayne has advanced this idea in language so much better than any I can use, that I give his own words:

"The departments of the government are legislative, executive, and judicial. They are co-ordinate in degree to the extent of the powers delegated to each of them. Each in the exercise of its power is independent of the others; but all rightfully done by either is binding upon the others. The Constitution is supreme over all of them, because the people who ratified it have made it so."

When the Constitution was first framed it was received by a great many thinking people with a great deal of distrust. An examination of the history of the conventions of the States which were called to ratify and confirm that instrument, without which it would have had no efficacy, will show that it was fiercely assailed, and the debates upon it in regard to its adoption in

several of the States showed that the issue was doubtful.

It is well, perhaps, to consider for a moment some of the objections to that instrument in the light of ninety years' experience. One of the greatest was that it conferred too much power upon the central or Federal government, and curtailed too largely the powers of the State governments. You must remember that these colonies had just been emancipated from the parent government. They had worked together for a short time, and not very harmoniously. Each man felt that in his own State he had a larger interest than he had in the welfare of all the States; and it is one of the most creditable and remarkable things that the superior knowledge and influence of a few great minds were able to overcome these prejudices and enact that Constitution into a form of government. But several of the States, in the act of adopting it, proposed amendments to be made under the provision in that instrument for amendments; and within two years after it was ratified Congress passed and proposed to the different States thirteen amendments to that instrument, eleven of which were ratified by the requisite number of States to make them part of the Constitution. In those

amendments, when you look at them carefully, you will see this distrust of the power of the central government, and this desire to protect the States from being overwhelmed and annihilated by this power. That fight—that contest, I should rather say—has gone on, I might say, to the present time. I would be glad to say that with the recent war it was settled; but while it has undergone various discussion, it is not practically settled. But it is sufficient to say—I think I can venture to say; others may disagree with me—that the experience of ninety years under this government has shown that danger to the perpetuity of government, danger to the people of this country, is not in the central power, and was not in the central power, but was in the power of the States. [Applause.]

Another objection, second in importance in the minds of those who were not favorable to that Constitution, was the power of the executive. It was said to be inconsistent with the genius of the government which we were establishing, that any one man should, for the period of four years, exercise the extraordinary power which that instrument vested in the President of the United States. It was said that the appointment of all the officers of the Federal

government, the distribution of all its patronage, the control of its army and its navy, would, in process of time, enable some man to build up a power which could not be resisted; that some man would arise who, by that power and with that inclination, would destroy the really democratic features of our government, and establish a monarchy in its place.

Now, of all the delusions, of all the mistakes which our ancestors made, that seems to have been at once the most likely to be made, yet which has practically turned out to be most untrue.

It is my deliberate opinion that, of all the three branches of government, the executive branch has been in time, under the construction given that instrument and its practical administration, most shorn of the powers which the Constitution granted it. The President of the United States for the first forty or fifty years did practically nominate all the officers; he selected his Cabinet, a few private friends, occasionally a member of Congress or two, making suggestions. But, within the memory of many men around me, the time arrived when the President (as the gentleman who has travelled around the world with General Grant reports him as saying) but regis-

ters the edict of members of Congress in appointments to office; that is to say, in the function about which mainly the executive is employed, he has become subjugated to the legislative branch of the government; and of all the delusive ideas, of all the fallacies that ever entered the brain of anybody in this world, the most delusive and fallacious is the idea that any executive, that a Jackson or a Grant, or anybody in this country, will ever make himself a perpetual dictator in our time and generation, or in generations to come. [Applause.]

The branch of the government which has grown in its powers, which perhaps a sagacious man might have seen would so grow, is the legislative department of the government. Coming, as it does, more immediately from the people, at least one branch of it, and all of it representing either the States or the people, who look to their Senators and to their members as representing them in all their legislation and all that looks like legislation, and a great deal that is not legislation,—the people tolerate in these, their representatives and members, what they will not tolerate in the executive, what they will not tolerate in the judicial department of the government; because they say, "We think that if they do badly

this year, we can turn them out next, and we are not afraid of them." But this has been a very unfortunate sentiment. I speak it with due deference to a co-ordinate branch of the government. I have no doubt that the dangers in our form of government are greatest in the legislative branch of it. They are extending their borders, and they are making broad their phylacteries in every direction. They pass laws sometimes which are unconstitutional, and they assert powers which are executive and judicial in their nature and character.

The judicial branch of the government is, of all others, the weakest branch. It has no army; it has no navy; it has no press; it has no officers except its marshals, and they are appointed by the President and confirmed by the Senate; and the marshals that we send our processes to cannot be removed by us, but they may be removed any day by the executive. The clerks whom they permit us in some form or other to appoint, have salaries and compensations regulated by the legislature; and a clerk who gets $20,000 in fees, pays all but $3,500 into the Treasury of the United States. We are, then, so far as the ordinary forms of power are concerned, by far the feeblest branch or department of the govern-

ment. We have to rely—I beg pardon for using the personal pronoun in this discussion—but the judiciary have to rely on the confidence and respect of the public for their weight and influence in the government; and I am happy to say that the country, the people, and the other branches of the government have never been found wanting in that respect and in that confidence. It is one of the best tributes to the American nation—a tribute which it deserves above all others even of the Anglo-Saxon race—a tribute which can be paid to no other race like the Anglo-Saxon race—that they submit to the law as expounded by the judiciary. [Applause.]

Under all the excitement of wealth; of money; of the contest of railroads; of political existence—everything which can be got before the court—everything which can come fairly within judicial cognizance—our people seem to think is safe. And whatever may be said or felt about the recent trouble in the State of Maine, there is no grander phenomenon to be found in the history of this country than a body calling itself a legal legislature and government quietly laying down its functions and dispersing at the mere opinion of a court that they were not the proper government. [Applause.]

Of course, gentlemen, there are nice questions between these various departments of the government as to the lines of demarkation; and it has always been an anxious question, and always must be one, where there is a conflict in the claims of these branches of the government. While it is the duty of the court to construe the great instrument, the Constitution, whenever it shall come before it in a fair judicial proceeding, and it can construe it in no other way,—for it is a delusion, it is a mistake, the idea that the Supreme Court of the United States was created with one of its special functions to interpret and construe that instrument,—I say while, however, it is the special function of the courts to construe the Constitution in a judicial proceeding, with parties properly before them, it is equally the duty of each member of Congress and of the executive to make that construction for himself when he is called to act within the sphere of his duty. And I think myself I have changed one of my beliefs of early life, when I used to think that when a Marshall and his compeers had decided that the Bank of the United States was a financial institution authorized by the Constitution of the United States, the legislative and executive branches should also concede that fact. I

am prepared to admit, that while they are bound to consider that in that particular—that is, its execution of the law as between the parties—all the other branches of the government must yield, yet when it comes to the conscience of any member of Congress or any executive to say, "Can I sign a bill?" or "Can I vote for a measure?" it is for him to decide, on the best lights he has, whether the act he is going to do is within the constitutional power of the body of which he is a member. Therefore you see the difficulty in getting a settled construction of this instrument. And since every branch of the government, when called on to act originally, is bound to act on the judgment it forms of its own powers, you can understand the reason that for eighty or ninety years the question of the relations of the States to the Federal government should remain an open and undecided question.

We are, however, getting a body of decisions of recognized principles. The instrument is being construed by the judicial branch more than the others, but largely by all others, in the light of the events which have arisen to test it. The construction which was put upon the Constitution during the recent insurrection—the powers that could be exercised in such an emergency by the President,

by the War Department, by the Legislature, by the Judiciary, all have been tested—all have undergone investigation; and while no man can say that all the decisions have been correct, because they have been varying, it must, in the light of any impartial mind, be clear that we are completing a construction and are deciding a great many things that will remain forever, with regard to the Constitution.

It is very desirable that it should be so. All loose construction of authority is dangerous; all construction of authority too limited to serve the purpose for which it is given is injurious. You must look at that instrument in the light of the purposes which it was intended to answer; in the light of the evils it was intended to remedy; in the light of the fact that we were a dissolving people, and the instrument was intended to bind us anew forever; in the light of the fact that the government was going to pieces for want of power to protect itself, and we must consider that one of the purposes of the Constitution was to give the government that power; in the light of the fact that the Confederacy—the government under the Articles of Confederation—could only request the States to do a great deal that was necessary to carry on the Federal government,

and it was desirable to give the new government the power of operating directly upon the people without going through the instrumentality of the States, and that instead of laws which before that Constitution was made were intended to have effect through the State legislatures, the government should now have direct effect through the legislation of Congress—the action of the legislative branch—and the judiciary, upon the people themselves, without the consent, and even against the wishes, of the States, if it were necessary.

In all these ways, when you come to construe this instrument like a remedial statute, like a contract between individuals, it must be construed in the light of the times in which it was made—of the evils to be remedied, of the good to be effected, and, above all, in the light of the idea that it was made to create a perpetual government of the people, among the people, and by the people.

Second Lecture.

On last Friday evening, gentlemen, you will remember that I closed my remarks by some observations on the division which the Constitution made of the powers to be exercised by the national government into the three departments, legislative, executive, and judicial. As students of law, I take it for granted that the branch of the government in which you are most interested, or at least in which you are most interested in having an exposition of its powers and duties, is the judicial branch, and that is the subject on which I propose to address you this evening.

After the manner of the clergy, I presume that the best thing I can do is to read you my text; and as the whole chapter is not a very long one, although a very important one, I will read you the third article of the Constitution. That instrument devotes one article to the legislative, one to the executive, and one to the judicial branch, and these are the main articles of the Constitution. There are then some provisions

establishing private rights; some provisions concerning the powers of the two houses; but the main body of the Constitution is to be found in the three articles. The judicial article comes third and last. It says:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

"SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

"The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

"SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

"No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."

Now, I propose to turn your attention first to the second section:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

The first thing that justifies or requires any criticism is on the words "judicial power." What is judicial power? It would not do to answer that it is power exercised by the courts, because one of the very things to be determined is what power the courts may exercise; and it is very difficult to find any exact definition made to hand. I know it cannot be found in any of

the old treaties, or any of the old English authorities or judicial decisions, for a very obvious reason, that while in a general way they had this division between the legislative and judicial power, yet their legislature was in the habit of exercising a very large part of the judicial power of the country. The House of Lords was often the court of appeals, and they were in the habit of passing bills of attainder and of enacting convictions for treason in Parliament. The judicial power is defined, perhaps, better in some of the reports of our own courts, especially the Supreme Court of the United States, than in any other place, because it has oftener been the subject of comment, oftener necessary to be decided, in that court, than anywhere else. The judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before the court for judicial decision. And hence, you see, after the words "judicial power," the language goes on, "shall extend to all cases" of a particular character, describing what character. So that, before there can be any proper exercise of the judicial power, there must be "a case" presented in court for its action. A case implies parties; a case implies an assertion of rights; a

case implies a wrong to be remedied; and our decisions in the Supreme Court of the United States, and in the other various courts, are full of definitions of what a case is. I will read some of them very shortly, as I find them in Mr. Paschal's "Annotated Constitution," a very valuable work in giving you the authorities to which you had better refer, so that you may see the whole of their leading features. I am compelled to omit much in the short time to which I am limited in these lectures.

"A case"—says Chief Justice Marshall, in the case of Osborn against the United States Bank, 9th Wheaton, p. 319—"a case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties, or laws of the United States has assumed such a form that the judicial power is capable of acting upon it."

And in this connection, it is proper, I think, that I should endeavor to correct a very erroneous impression that prevails with regard to the powers of the Supreme Court of the United States as the expounder of the Constitution. I have seen it asserted, even in popular treatises, in public speeches, and in political harangues, that the Supreme Court of the United States is the final expounder, and that it was made for the

purpose of expounding the Constitution, and that one of its primary functions is to do that. But it has been over and again held in our court that all we can do in the way of expounding the Constitution is to decide the questions in which the Constitution may be involved in a suit between proper parties. To be sure, in some cases these parties have been very dignified ones. They have been the United States; they have been States suing each other in our courts; but oftener than otherwise—I should say, nine times out of ten that the court has been called upon to construe the Constitution of the United States—it has been a question of right between private individuals, in which the validity of a law, or of a right asserted by one side and denied by the other, has to be settled by the Constitution of the United States. So that we only do in our way in a higher position—as being the last court to which such questions can be brought—what every court in the United States has to do, whether it is a State court, a Federal court, or any other court. We only decide such questions as they arise in the progress of ordinary litigation.

This, then, is what I have to say upon the subject of cases, as the Constitution is affected,

with regard to the word "cases." "The judicial power shall extend to all cases, in law and in equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority." That is to say, the judicial power of the Federal government extends to all cases where a right exists under the Constitution, a right under the laws of the United States which are made in accordance with the Constitution, or a right under a treaty which shall be made under the authority of the Constitution.

That class of cases the Federal power extends over, covers them, and they come within its jurisdiction. "All cases, in law and in equity." There is a separate clause with regard to admiralty, which I will speak of presently. It must be with the exception of admiralty "in law or in equity,"—and an attempt has been made to exclude a very large class of cases arising in the State courts, and in other courts, which were of an anomalous character; remedies given by peculiar modes of proceeding—summary remedies by attachment, and summary proceedings at variance with the common law, which were therefore said not to be suits at law, and which yet did not come under the head of equity juris-

prudence. But the decisions of the Supreme Court of the United States are abundant to the effect that, with the exception of admiralty, all the modes of procedure for the assertion of rights must be ranged under the one class or the other, of law or equity, within the meaning of that clause of the Constitution. Equity is a limited jurisdiction which has grown up since the common law, which in some sense is a restriction of and departure from the common law. There is not much difficulty as to what are cases in equity; and I have no doubt you have an able professor who has told you, or will tell you, what is equity jurisdiction. It is sufficient to say that the Federal courts have held that all the cases that are neither admiralty nor equity are, within this clause of the Constitution, cases at law. Indeed, the Supreme Court have held—they have been compelled to hold, in regard to the improvements, I will venture to say, in the modes of procedure which have been adopted by the codes of the various States, in most of which equity and law have been consolidated, and in reference to many statutes giving new rights, new modes of procedure, new remedies—the Supreme Court have been compelled to hold that, when the Federal courts come to administer those rights and

those remedies, they must range them on the dockets of those courts on the equity side, or on the law side, as the nature of the right asserted, or of the remedy given, may require. We do this as equity is understood and was understood in the English courts at the time of the Revolution; and we have held that in the Federal courts no action of the States, no statutes of the States, no laws of the States, or rules which have been adopted at law or in equity in State courts—that none of them can abolish the separate and distinct equity jurisdiction of the Federal courts; and that wherever a case is, in its nature, one which belongs to the equitable jurisdiction of the courts, it must be tried on the chancery side of the Federal court which has taken charge of it. One of the necessary distinctions in that regard is, that another provision of the Constitution declares that in all suits at law the value of which exceeds twenty dollars, every one shall have the right of trial by jury, and the right of trial by jury is no part of the system of equity jurisprudence; so that the Federal courts have been compelled to keep separate and distinct, cases at law and cases in equity.

"The judicial power shall extend to all cases,

in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." That is to say, a case arises under the Constitution whenever some man's constitutional right is denied to him; some right which this instrument gives him—right of property, right to liberty, right to vote—whatever right he can trace under this Constitution. That is a right, which, if it is impinged, or denied, or delayed, he can bring into the courts of the United States by virtue of that provision of the Constitution.

And so of the laws of the United States: "all cases arising under the laws of the United States." Now, the Constitution itself is a very general instrument. The rights which it confers are in very general language; but these rights, these duties, these obligations, have been put into full operation—have been defined and perfected by statutes which are called laws of the United States. Whenever, therefore, an individual has a claim or a right under an act of the United States which he can enforce, which can only be enforced, or which he seeks to enforce by the judicial power, the place to seek that power is in some of the judicial departments or branches of the United States.

"The treaties made, or which shall be made, under their authority." It is proper that I should make some qualification in regard to the word "treaties." A treaty always means a compact or convention between two independent nations or governments. Independence is necessary, at least *quasi;* some degree of independence is necessary in order that the treaty may exist between the parties who make it. So that, so far as the treaty itself is a national obligation to be enforced by the action of the States who have made it, by war, or by negotiations, or by modification, or by appeals to the State, the courts have nothing to do with it, and the courts must follow and abide by what the government proper does upon that subject—what, in the language of the Supreme Court of the United States, we call the political branches of the government having charge of that relation.

But a treaty may be the foundation of a private right, and then it becomes a subject of judicial action, as any other private right does. An instance occurred in the Supreme Court within the last six or eight weeks. There are treaties between the United States and all or nearly all European governments concerning the right to inherit land by aliens. A man who comes from

a European country here, until he becomes naturalized, is an alien. He may live here and die here, and have children here, but he is an alien. An alien by the common law, by the prevalent law, could not inherit real estate, and when he died it could not go to his children; his father could not take it, he being an alien. The most of the States of the Union have passed laws to remedy that evil, but some of those laws have been imperfect, and many have passed no laws at all. But the United States Government has entered into treaties because there were so many aliens, such a very large proportion of our population are emigrants from these countries, who come here and do business, acquire property, and never take out naturalization papers; and since it has not been shown that Congress has any power over the subject, our government has entered into treaties with foreign nations by which these men can inherit the property of their fathers.

Now, we had a case from the State of Virginia the other day, in which the law of Virginia had failed to conform itself to this treaty. The proper authorities of the State of Virginia had seized the dead man's estate, and had instituted proceedings in the nature of what we call escheat,

which is a process by which property that does not belong to anybody else goes to the government; and in their proceedings they disregarded the rights of this man, and his case was brought under that provision of the Constitution to our court, and we held that he was entitled to the property by virtue of the treaty. That was a case arising under a treaty made in pursuance of the Constitution.

Now we go on further. It shall not only extend to cases arising under the Constitution and the laws of the United States and treaties made, or which shall be made, under its authority, but the text goes on and assumes another form of expression. Heretofore it has been dealing with the subject-matter of the suit—with the nature of the controversy going on. Now it uses another form of expression; it shall extend to all cases affecting classes of people; "ambassadors and other public ministers and consuls," by which, you understand, every ambassador from a foreign government to this country, or if he be not of the grade of an ambassador, if he be a minister—because these diplomatic gentlemen have various grades, very high-sounding grades—Ministers Plenipotentiary, I think, some of them are, and a few of them have the title of Ministers Plenipo-

tentiary and Envoy Extraordinary; I understand that Ambassador is the highest office of any of them;—but whether they be ambassadors, or public ministers, or mere consuls at our various ports, they have the right to have all their cases tried in the Federal courts—some branch of them. You understand the cause of that. These being representatives of foreign governments, independent nations, are not to be subjected to the powers of the States who have no relation to those governments, but are to be brought before the courts of the Government of the United States, who can look into those troubles and right them.

"To all cases of admiralty and maritime jurisdiction." That is a very peculiar thing to be in that Constitution. I suppose the reason it was put there is, that while admiralty cases do not involve any law or statute of the United States, nor the Constitution of the United States, nor a treaty, yet at the time this Constitution was framed admiralty being supposed to be limited (as it was in England) to traffic on the ocean, to the affairs of vessels and seamen and navigators of the ocean, it was in the nature of an international relation, and, coming immediately in juxtaposition with the clause relating to ambassadors and ministers, I have no doubt that was the reason why it was

taken out from ordinary cases and placed with the judicial power of the United States. That, however, is an interpolation in that clause of the subject-matter of jurisdiction instead of the character of the party.

The instrument now leaves the form of using the word "cases," and it leaves the reference to the subject-matter of jurisdiction, and proceeds again to the person—to give jurisdiction by the description of persons or parties who shall come before the court; and instead of the case, it goes on to say—you will supply the word "extend"—"to controversies to which the United States shall be a party." Whenever the United States is a party in a suit the Federal courts may have jurisdiction—that is, courts acting under the Federal power, in which alone the United States can be sued, and which are courts established under the authority of the United States. Suits in which the United States may sue to recover property and taxes; suits on bonds against defaulting officers; prosecutions for crimes against the United States,—all these are cases in which the United States is a party, and in which she sues in the courts of her own creation.

"Controversies between two or more States." There never was any tribunal but one in the

history of time, anterior to this Constitution, which had jurisdiction, in the full sense of the word, of controversies between States. The old Olympic Council, among the Greeks might possibly have been called a court or tribunal in some sense, but certainly in no such sense as the Supreme Court of the United States is a court. They could meet and hear complaints of the Greek States against each other. Athens and Sparta and Corinth could meet before that council and complain of each other's acts, and the council could recommend what should be done, but they had no power to give it any effect. The Constitution of the United States creates, as I shall proceed to show in another clause, a court with jurisdiction of controversies between States, which can bring these States by process before it as it can bring the humblest citizen of the United States, and which can declare its judgment, and which has usually been able to enforce its judgment.

"Controversies between a State and the citizens of another State." That is to say, while a State cannot sue one of its own citizens in the courts of the United States, it can sue the citizens of other States in those courts. As this Constitution stood at the time when it was adopted,

a citizen of one State could sue another State in the courts of the United States; but as soon as a case of that kind originated, in which a State found its dignity infringed, and that a State could be brought into the court by everybody, the requisite number of States modified that provision of the Constitution by declaring that it should not apply to suits by citizens of one State against another State. The jurisdiction is between States, and between a State and citizens of other States when the State is plaintiff.

"Controversies between citizens of different States." And here is the largest source, as it turns out, of the jurisdiction of the Federal courts. You will understand that while the previous part of this section granting parties a right to sue in the Federal courts, in any action arising under the Constitution and laws and treaties of the United States, without regard to their citizenship or residence, these cases are those in which the character of the party gives the right to sue without reference to the nature of the matter at issue. And we have here a class of persons who can bring suits no matter what is the cause of action. On a promissory note, or assault and battery, or any other matter which can become the subject of a judicial investigation, this class of persons can

bring the suits in the United States courts; and the largest source of jurisdiction up to the present hour has been from suits between citizens of different States. A person living in Maryland can sue in the United States courts a person living in Virginia, and *e converso;* and so of other States. If you have the qualification of citizenship in one State, and your adversary has it in another State, the suit can be brought in the Federal courts. The reason for this, as has been frequently said by commentators and by courts, was the fear in the minds of the makers of the Constitution, that the local prejudice in favor of a man who is sued in the courts of his own State would result in unfair decisions against his nonresident adversary. As an illustration, one is living in Boston, and has a suit against a man living in New Orleans. It was supposed that the popularity, the home influence, of the man sued in New Orleans, and possibly some irritation and ill-feeling against citizens of another State, would stand in the way of his getting justice. So, also, seeing that the legislature had provided that the man so sued for an amount as much as twenty dollars might demand a trial by jury, that the jury might be affected by this class of prejudices, it was thought wise that a tribunal

which was supposed to be impartial should be provided, and which did not owe its appointment or compensation to the State in which the case was tried. A court owing its own allegiance and receiving its commission from the United States, would be a safer tribunal than a court which received its commission at the hands of a State, which could be influenced by the vote of a majority of the citizens, and swayed more or less in its decisions from the absolute principles of justice. It is on this account that this provision was placed in the Constitution; and it has been, and is to this day, in the ratio of four to one, the source of controversies, suits, and cases in the courts of the United States.

Now we come again in this intermingling to a class of cases that depend upon questions partly of citizenship and partly of a particular issue "between citizens of the same State claiming lands under grants of different States." At the time this Constitution was framed, Virginia claimed, I believe—or had claimed—a large part of the great Northwestern Territory; certainly there was a very large amount of land which was claimed under the authority of the original State of Virginia. Connecticut had a grant which is now in the State of Ohio. What is called now the Western

Reserve, with a population of a quarter of a million, was, by the grant under it, held from the State of Connecticut. It was supposed, where there was this evil of grants under the different States, there would be controversies, and this was a provision giving the Federal courts jurisdiction of that class of cases. And finally, controversies "between a State or the citizens thereof and foreign States, citizens, or subjects." Every foreign State is entitled to sue in the Federal courts any of our citizens; and if we can get hold of anything they have, we have a right to sue them in the Federal courts.

These are the classes of cases and the nature of the controversies and the characteristics of the parties who, by the fundamental law of this land, are authorized to bring suits in the courts of the United States. But in the largest part of them there is required an act of Congress to create the courts which should exercise this jurisdiction. Congress, immediately after the organization of the government, did create courts, but up to the present time—certainly up to within five years ago—a very large body of this judicial power was vested in no court at all, and therefore could not be exercised in a court of the United States; and at the present hour there is a very large limita-

tion upon the class of cases the power in regard to which has been vested by acts of Congress. For instance, no suit can be brought in the courts of the United States where the amount in controversy does not exceed five hundred dollars in value, with the exception of criminal cases, patent cases, and revenue cases, in which the United States is concerned, where the United States may bring suit without reference to the value. But a citizen of the United States cannot bring a suit in a court of the United States, unless it be a patent case, an admiralty case, or where the value in controversy exceeds five hundred dollars. I understand there is a bill before Congress to extend the rule of exclusion still further, by making the amount two thousand dollars; and it was only in 1875 that they passed a law which authorized the bringing in the Federal courts of all cases arising under the Constitution, the laws, and treaties made under their authority. Previous to 1875, if the party had a right, under the Constitution, the laws, or treaties, but had not the requisite citizenship, he had to go before the State court; and when he had carried his case through all the State courts, up to the highest, then, by a writ of error, the question which concerned the Federal jurisdiction might be brought to the

Supreme Court of the United States, if decided against him. But now, by the act of 1875, that class of cases, of five hundred dollars in value, may be brought originally in the Circuit Courts of the United States.

I have read to you and commented mainly on the second section in advance of the first section, because this is the section which defines the judicial power of the United States, which tells us the classes of cases that it may extend to, and which, therefore, is of primary importance to the student of law.

The first section—which, perhaps, in the order of sequence, might have been first read—provides that "the judicial power of the United States"—this power of which we have been talking—"shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

"The judicial power shall be vested in one Supreme Court." There can be, therefore, but one Supreme Court. That court, once in exist-

ence, cannot be abolished, because its foundation is not in an act of Congress, but in the Constitution of the United States. It is true, an act of Congress was necessary to define the number of these judges, to some extent to limit their jurisdiction, as I shall presently show, and to provide for their compensation; but that thing once done, you find that the judges shall hold office during good behavior. They cannot be legislated out of office; they "shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." When they once have established the compensation of judges, they cannot diminish that compensation during the term of the judge then in office. You can see an obvious reason for that. As I told you the other evening, the judicial branch of the government is the weakest branch. It has neither the purse nor the sword. It is dependent upon annual appropriations for the bread on which its judges live. The courts are dependent upon the President's furnishing marshals who shall execute their decrees; and the makers of this wonderful instrument, perfectly aware of the waves of passion which frequently run through the legislative and executive branches of the government, and that this judicial body

would be called upon occasionally to declare what the Constitution means, and that what Congress had said were laws were not constitutional, and that might provoke hostility, they said: "You cannot diminish these gentlemen's salaries because they do not agree with you." And they said more than that to the President: "You shall not turn them out of office; they shall remain as long as they shall live, provided they behave themselves." Well, I do not know how well they have behaved; but the only mode of determining that thing is by impeachment. One judge of the Supreme Court of the United States went through the process of impeachment and came out unhurt.

So that this judicial body, these men,—I am not speaking alone of the Supreme Court, but of all the Federal courts,—have this protection. And speaking of this Supreme Court, I will call your attention again to the fact that this power is vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. The Constitution does not admit that it should be abolished or the judges legislated out of existence. It has been argued very forcibly, probably with truth, that all the other courts can, by legislative act, be abolished,

and their powers conferred on other courts, subdivided in different modes.

It is declared in one of the clauses which I have read to you—the second clause of the second section—that in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; that is to say, that there is a class of cases where you need not go through the forms of the lower courts, the Circuit Courts, District Courts, or anything else; for if a man is an ambassador, or a minister, or a consul, or if a State is a party,—as the Constitution as amended has it, if a State is a party against another State, or if a State choose to bring a suit against the citizens of another State,—that suit can be brought at once in the Supreme Court in its original jurisdiction, the word "original" being used in contradistinction to appellate jurisdiction.

This class of persons, then, is limited, and the number of suits in the original jurisdiction of the Supreme Court is very small. It never amounts to more than eight or ten cases at a time. In all other cases before mentioned—that is, in all that large mass of cases to which the power of the Federal government extends—"the Supreme

Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make." The Congress, therefore, can control very largely the appellate jurisdiction of the United States Supreme Court. It has done so; it has passed laws at various times regulating that jurisdiction. One of its earliest laws upon the subject was that no ordinary suit between individuals could come to the Supreme Court for revision unless there were two thousand dollars involved; it is now five thousand dollars; and there is a pressure now, either by the creation of some intermediate appellate court or otherwise, to enlarge that sum to ten or twenty thousand dollars, so that only cases involving great amounts, and certain other cases of the class first mentioned, where the Constitution of the United States is involved, or where a conflict between State and Federal authority is involved, may go up to the Supreme Court of the United States.

You see, therefore, gentlemen, that after having prescribed, with wonderful particularity, the classes and kinds of suits which may be brought before it, the Constitution has created a judicial department of this government as one of its three branches, and to that exclusively is delegated the

judicial power of the government. The lines which mark legislative and judicial power are not very well defined, but they are becoming more and more so. Our courts are full of decisions on that subject. It is judicial power which, in a controversy, decides the rights to property between citizens. It is not a legislative power; and when a legislature, or at least the legislature of this Federal government, shall declare that the property which was, or is, the property of A, shall become the property of B, it is an invasion of the judicial function; and the court would not hesitate to say that that was an act which belongs to the courts alone; that the legislature cannot do it, because of this separation in the Constitution of judicial and legislative powers. So the executive may, under certain circumstances, invade the personal rights of the individual, as regards his liberty. It has been done in cases of emergency; it may be done again; because the writ of *habeas corpus* may be suspended, and the President or the executive officers may order a man into imprisonment. But in all these cases they are to be careful to exercise their power within the law. Whenever they do this arbitrarily, by creating a law for themselves in violation of the restrictions which

both the Constitution and the laws have thrown around private rights, they invade the judicial functions and power of the United States, and the courts will set that man at liberty if their mandates are observed.

Third Lecture.

In these three addresses, gentlemen, that I have undertaken to deliver to you on the Constitution of the United States, it is impossible to do more than take up in a fragmentary way particular parts of it. The instrument itself is so all-embracing; there are so many sections, subdivisions, sentences, and clauses, each of which has been the subject of judicial construction, and comment by the public press and in both houses of Congress, that it is impossible to do more in this way than to take up some particular subjects and speak to you about them.

This evening I propose to turn your attention, rather than deliver any formal lecture, to the provisions of that instrument which may be said to relate to *the protection of personal rights.* It is not a new feature in any instrument which professes to be a fundamental basis of government, although our Constitution, of which we are talking, was one of the earliest that attempted to institute *de novo* a systematic form of organic government. In

the history of the English race, at all events, prior to that time, were charters, concessions from the Crown, guaranteeing rights to the citizens; and perhaps that was the only possible mode in which our ancestors could establish on a broader basis their liberties, namely, by demanding from the monarchs of the English race concessions, charters, grants, and privileges. The great Magna Charta, about which you have heard so much, as probably the most famous paper in English history, were concessions exacted from King John, who was of a rather arbitrary disposition. This was mainly for the purpose of establishing the personal rights of his subjects.

Our Constitution, unlike most modern ones, does not contain any formal declaration or bill of rights. It has become the custom, and you will find inserted in most of the constitutions of the States what is called a bill of rights, intended to define and protect the personal rights of the citizens, or of the people who are subjected to the power of the government; and although there is no such formal list in this Constitution, there is scattered through it, in very irregular shape and at different places, some fundamental declarations of the right of the citizen for protection even against his own government, and against

the government which they were then organizing; to which I propose calling your attention this evening. For the very reason that they were scattered in that irregular manner, it is useful to have them brought before you in a shape that they may be looked at with some system.

The first of these to which I propose to call your attention, is that which relates to religion. The provisions on that subject are only two, and they do not go anything like as far as the popular idea supposes they do. What is said anywhere in this Constitution on the subject of religion is very limited. The first clause that you find upon that matter is at the close of the sixth article of the Constitution, and very near the close of the instrument—a very queer place, you would think, to find an article of that kind. It relates to the oath which the officers of the government shall take. It is the third clause of the sixth article:

"The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

Now, you may imagine, with your personal

experience and mine, that that was a very unnecessary provision in a Constitution intended for this country. But you are to remember, at the time that Constitution was framed, that very recently, every man in New England who held office had, in some way, either by an oath or in some form which tested his sincerity, to profess to belong to the Protestant religion, and some particular form of the Protestant religion. In England at that time no man could hold office who did not profess his belief in the thirty-nine articles of the English Church. And it was only in very modern times—I think about 1840—that Roman Catholics were permitted to hold office, and only in the last fifteen years that Jews were permitted to hold office in Great Britain. So you see that this was no imaginary thing, but a necessary and proper declaration to be made at that time, that under no circumstances should any religious test be required as a qualification for any public office in the Government of the United States. It was an advance.

That is all that is in the old Constitution as it was originally framed; but, as I told you the other evening, in the conventions of the States which voted upon the ratification of that Constitution, there was a very general distrust of the

powers which that instrument conferred as tending to centralization, and a great many States proposed amendments in those conventions, which were submitted at the first session of Congress after that body was organized, and adopted according to the rule which required two-thirds of the States to adopt amendments. There were then submitted to the vote of the States some fifteen amendments, of which twelve were adopted. The first of these amendments had reference to this subject. Still suspicious of the power of the general government, nearly all of the amendments submitted at that session of Congress were adopted with reference to the restraint upon the powers of the Federal government. The article is as follows:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peacefully to assemble, and to petition the government for redress of grievances."

"Congress shall make no law respecting the establishment of religion," and the other provision requires that there shall be no religious test required for officers under the United States Government. But there is in this instrument no limitation in regard to the *States* establishing

any formal religion, or against requiring any religious test in the officers of the States. The whole restriction is upon the *Federal* government; and, so far as this instrument is concerned to-day, contrary to the general impression, any State can establish Methodism, or Episcopalianism, or Unitarianism, or Universalism, as the religion of the State, to be supported by taxes to be levied upon the property of the people. I speak of this because it is a general opinion that no such thing could be done under the Constitution of the United States. There is no prohibition on that subject.

The next thing that I call your attention to is the writ of *habeas corpus*. Ever since the charter of King John, the writ of *habeas corpus* has been considered as the representative of the Englishman's right to the security of his personal liberty against the private seizure of his wife or children, and for any unlawful imprisonment whatever. The writ of *habeas corpus*, so established, was then and is now, and perhaps will always remain, the representative of liberty and the established form of maintaining that liberty. It comes from two Latin words: *habeas*, "have" or "take," and *corpus*, "the body"; and it is used in that way because the writ commences: "You will have the

body of the prisoner before the court" which issues it. The writ of *habeas corpus* was then in existence, and, in the constitutional provision on the subject, it is recognized as an existing remedy. It is not established by the Constitution; it is not created by the instrument; it is only spoken of, like so many other things in this instrument, as a known and existing institution; and it is for the protection and security of the citizen in the use of that writ that the provision on the subject is found in this Constitution. It is the second clause of section nine of the first article of the Constitution. After prescribing the powers which Congress shall have, and some provisions about the "migration or importation" of persons,—using that particular, formal phrase which the instrument so often does to avoid the word "slaves": "the migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation," —then the phrase to which I call your attention follows:

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

That is, it shall always be an existing remedy. No local authority shall suspend it; it shall not be denied for any ordinary cause; it shall be a remedy to which the poorest citizen may resort whenever he is imprisoned or detained forcibly, with the single exception of cases of rebellion or invasion, and even then only when the public safety requires it.

A very important question arose about who can suspend that writ—a question that has never been settled yet—which may yet come to be settled judicially. The President undertook to suspend it by proclamation, and that proclamation was acted on, and a great many people were imprisoned without relief. *Habeas corpus* was denied by a great many courts judicially, afterwards, on the ground that the President had suspended the writ, but there was a large class of jurists and statesmen who held that Congress only could suspend it. I do not propose to enter into that question. I can only say that President Lincoln thought expedient to suspend it, and undoubtedly circumstances rendered its suspension necessary at that time. But that great writ, which was intended for the protection of the citizen, shall not be suspended, which means shall not be denied,

except in cases of rebellion or invasion, and when the public safety requires it.

The original Constitution contains some other matters of this same class, to which I will direct your attention a few moments. Among them is the section with regard to bills of attainder. That is to be found in section ten of the first article of the Constitution, just after the one I have been speaking of:

"No bill of attainder or *ex post facto* law shall be passed."

That, of course, is a limitation upon the power of Congress. But section ten says:

"No State shall * * * * pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

You see that the makers of the Constitution not only declared that Congress should not pass any bill of attainder, but they went further, and said that no State should do so; and the same is true with regard to *ex post facto* laws.

These two things, bills of attainder and *ex post facto* laws, are, happily, unknown in this country. The provisions of the Constitution forbade them both to the States and to the Federal government ninety years ago, and we do not know anything about them in this age and generation. A

bill of attainder was a familiar mode in the English Parliament of punishing a man by an act of Parliament without a formal judicial trial, without a jury, without witnesses to be examined, if he had offended the sovereign power of the country.

In the frequent rebellions and revolutions that they had in that country, the party which, for the time being, became dominant punished its enemies by bills of attainder; and a bill of attainder was a law which declared that the man or men against whom the act was passed had forfeited all their rights of property; often it declared that they had forfeited their lives, and that the blood of that man and his family was attainted; so that neither could he inherit anything from his ancestors, nor his children inherit anything from him. And that is the origin of the word attainder, from the old Norman-French word *atteindre*. A bill of attainder attainted his blood, so that if he escaped with his life, and his father was a nobleman, or only a gentleman inheriting large real estate, this man could not inherit; and if he had children who were innocent, who had taken no part in the rebellion or quarrel which was the cause of it, those children could not inherit from him. He is cut off and blasted in his root and

branch, so that title to no property could go through him. And that was called a bill of attainder. That was the common mode of punishing treason, and also some other crimes. It was a frequent addition to the judicial punishment of enormous crimes, such as fratricide, that the man should not only be punished by death, but that he should be attainted.

So with regard to *ex post facto* laws: they were laws of a similar character. It was a question in our Supreme Court whether the expression *ex post facto* laws did not relate to all laws passed after the fact on which they were intended to operate; but the Supreme Court, at a very early day, held that it was a form of expression applicable solely to criminal proceedings, and that a law which affected only civil rights might be retroactive or retrospective in its effects; but that no statute which attempted to regulate criminal proceedings could be passed which made that which was not an offense at law a criminal offense afterwards. No law could be passed after a man had committed the act for which he was to be indicted or charged which should seriously affect the rule by which his guilt was to be determined; no new description of offenses which would include an act already done if it were not included

before; no new evidence which could not have been given at the time the act was committed can, by a new law, be introduced to affect a criminal proceeding. A great many cases have been before the court upon this point, and it is very well defined and understood; and the substance and essence of it is that no act can be passed, either by Congress or a State legislature, which, in its retroactive effect on a crime, or in its effect on an act committed before the law was passed, can make that criminal which was not criminal before, or make that punishable which was not punishable before, or in a more severe manner than it was punishable before, or make it to be ascertained by other and different rules of evidence than those which existed at the time it was committed.

These, as you will perceive, gentlemen, all belong to a class of provisions intended to secure the personal rights of the individual citizen.

Passing, now, from the original instrument to the amendments of which I have already spoken, and the first one of which I have read to you, to one or two of which I will call your attention again. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of

speech or of the press." I suppose you have all heard of that; it is a thing they talk about a good deal. The press does not say much about their abridgment of other people's freedom; but they are always appealing to this provision of the Constitution in their own behalf. This amendment is a limitation upon the powers of Congress. Fortunately, such has been the regard of Congress for the freedom of the press and of speech, such has been the popular feeling in this country for the right of every man to say and write what he pleases, that there has been no attempt on the part of Congress, except once in its history, that I know of, to infringe this article of the Constitution, to do anything which might be pronounced an infringement. During the great contest between the Federal party and the anti-Federal party, at the close of Mr. John Adams' administration, they passed a law called the alien and sedition law—two laws, rather: one was the alien and the other the sedition law. The sedition law did have provisions against the publication of articles in the newspapers, or otherwise, calculated to stir up sedition among the people; but before they could come to the courts the Jeffersonian *régime* came into power, and the whole of that system of legislation was repealed. It only re-

mains as a curiosity upon our statute-books. Perhaps there are some gentlemen in this house old enough to remember when our Democratic brethren used to charge their opponents with being the advocates and framers of the alien and sedition laws; but, as much as it was talked about and written about, it never became the subject of any judicial judgment in this country, that I know of.

"Or the right of the people peaceably to assemble and to petition the government for redress of grievances." All those things, fortunately, are things which, not only in this country, but in the country with which our ancestors were familiar, have passed away. The press was fettered in England, and the freedom of speech was fettered in England, and the right of the people to assemble was fettered; and in France to-day, although it is a republic, the censor thinks no more of stopping a newspaper for six or eight months than a policeman would of arresting a man on the streets here. In Louis Napoleon's time, if more than three men were found together and could not tell what they were talking about, they were arrested. Those things were common in the days when the Constitution was framed, but they have passed away, and we do not realize that they ever were.

The next article, the third of the amendments, is:

"That no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law."

That is another grievance we do not know in this country. No man here has seen a soldier quartered on a private citizen. But it was the habit of the English Government and all governments of Europe—the English being the most liberal—to have their soldiers in times of peace billeted on the citizens. Regiments of soldiers would be quartered in York or Liverpool, or in Scotland, or some place where it was necessary they should be; and instead of paying for their support, as we do now, and as all nations do, I think, each soldier was billeted on a citizen,—that is, boarded and lodged; and if there was any compensation, it was irregular and uncertain. There was no right on the part of the citizen to refuse. They were, perhaps, in some way compensated, but they had no right to say: "You shall not put a soldier in my house at all." This provision not only says it shall not be done at all in time of peace without the consent of the owner, but that it shall be done in time of war only in a manner to be prescribed by law. It contemplates the

possible fact that in time of great emergency, in time of war, it may be necessary, but even then not at the will of the commander, but in a manner to be prescribed by the general law of the land.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." That was a grand general proposition. Perhaps all the English people would say that is the right of all of us anyhow; but the provision goes further, and says:

"And no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That has been of great utility in this country. Formerly, general search-warrants were issued by magistrates, courts, and clerks, to officers, to search any man's house for anything that might be supposed to elucidate and explain crime and bring criminals to justice or establish private rights; and in addition to this declaration that this shall not be done, the article goes on to say in what way it can be done; that is, warrants shall issue, first, "upon probable cause, supported by oath or affirmation, and particularly describ-

ing the place to be searched, and the persons or things to be seized."

Now comes an article embodying, perhaps, more important matter regarding the liberty of the citizen than any other in the Constitution, until we come to some of those adopted since the Rebellion. Article V of the amendments declares that

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

I read the sixth article in the same connection:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Here is the great bulwark which has been

thrown up against improper, vindictive, and overbearing prosecutions, as a limitation upon the powers of the United States; and in the Constitutions of most of the States similar provisions are found.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." Here is a distinction between a capital or infamous crime and those of minor offenses. A man might be proceeded against on information for defrauding the revenue; for petty offenses of an insignificant character; for slander and assault and battery; for a great many things; but if the crime is one which renders him infamous, of which the general punishment is sending him to the penitentiary, an offense they call felony—if he is to be tried for that, he cannot be tried except upon indictment by a grand jury. It is very doubtful whether that is a wise provision now. There are a great many States seeking to get rid of it. Instead of a bulwark, it has been made a stumbling block. Like the press, like religion, like government itself, it is capable of perversion; but at the time when these sentiments were delivered, when, in the country from which we came, men were prosecuted for the

slightest thing in the way of uttering or speaking a harsh word against the King, or against the King's character,—when they were prosecuted without indictment, on information and convicted upon presumption, why, it was something to declare, as the permanent law of this country, that no man should be so prosecuted until the grand jury inquired into his case and ascertained the grounds of the charge against him. There are some cases which are exceptions:

"Except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger."

The reason of that was that they could not stop to try him by jury, and they had to try him suddenly and dispose of his case.

Now, another thing:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb."

That was an old common-law maxim, but was thought to be sufficiently important to be put in the Constitution. The meaning of it is, that if a man is tried, and the jury renders a verdict, he can never be tried for that offense again. The phrase "life and limb" is an old technical one, which is construed to mean the life or liberty of himself or the loss of his property. When you

come to practice law, you will find in civil cases the same doctrine to be that no man shall be twice vexed for the same cause. It means the same thing. And the other maxim on which it rests is, that it is the interest of the republic that litigation shall have an end. So that the principle of the common law, of the civil law, and of the criminal law is, that when a man has once been tried by a competent tribunal and the case is ended so as to be beyond appeal or review, the charge can never be brought against that man again, and he can never dispute the judgment again.

"Nor shall he be compelled, in any case, to be a witness against himself." That was a provision necessary in that day. All of you who have read Scott's novels, for instance, will remember the man who was tried for some offense against the Crown—I think some one of those Scotch covenanters who were engaged in the rebellion—and they wanted to make him testify against himself and also against his co-conspirators. They applied the thumb-screw to him, and there were various other modes of torture; but Scott tells us that the man was brought before Lord Lauderdale, and, after suffering a great deal, his lordship said to him: "Why don't you tell rather than

suffer so much?" Said he: "My lord, if I accuse any man, you will be the first one that I shall accuse under this pressure." Now, that thing struck Lauderdale and others engaged in the trial so forcibly, that very soon after torture was abolished, although the rule continued that a man could testify, if he would, against himself. But this clause says that no man can be compelled to testify against himself in a criminal case.

And now comes the other provision:

"Nor be deprived of life, liberty, or property without due process of law."

To describe what is "due process of law" might perhaps occupy a whole lecture with a great deal of profit. It is a provision that in this branch of the Constitution, in these first amendments, this fifth amendment was put in as a limitation upon the power of Congress. It meant that neither Congress, nor the President, nor the executive, nor the courts, should deprive any man of life, liberty, or property without due process of law. In the fourteenth amendment, one of the last that has ever been adopted, the Constitution has extended that prohibition to the States:

"No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law."

So that neither Congress nor a State is authorized to deprive any individual of life, liberty, or property without due process of law; and it becomes, therefore, very important to know what "due process of law" is.

Neither the Congress of the United States—to its credit be it said—nor the executive, nor the courts, so far as I know, have hardly ever in any instance been charged with attempting to do that thing; but the States have not been so temperate, and they are not so temperate in their legislation generally as Congress is. Since that provision has been the law of the land, since 1867—when, I believe, that amendment was adopted—the Federal courts are filled with suits brought to vindicate the rights of citizens under that clause of the Constitution; the parties alleging that State laws and State officers, executive, judicial, and ministerial, are constantly invading the right of life, liberty, and property without regard to due process of law; and it has become a very grave question what due process of law means. It is so frequently before the courts that I do not dare to give you a definition. It is best that

the Supreme Court of the United States, the final arbiter in such cases, should proceed slowly, and declare, as each particular case comes before it, whether it is or is not a violation of that provision, and whether the proceedings are or are not according to due process of law. It is sufficient to say that by due process of law is meant some proceeding according to a recognized course of law. In other words, neither Congress nor a State can pass a law declaring that the property which belonged to A shall at once be the property of B. They cannot pass a law declaring that the United States may seize property and do as they please with it; they cannot pass a law that a State can do that; they cannot pass a law that you can summon a constable and put a writ in his hands, and by that means get a title to the property that belongs to me. There must be a legal mode of proceeding, a judicial mode of proceeding, but always a proceeding by a law prescribing modes by which the rights of the parties may be determined. That is due process of law; and short of that, it is not due process of law.

I perceive, gentlemen, that if I should continue this minute way through all of these subdivisions I should occupy a longer time than I proposed.

There is one other, however, which is quite important:

"Nor shall private property be taken for public use without just compensation."

If the Government of the United States wants a piece of property to build a court-house, a prison, or a capitol; wants private property for any public purpose, it cannot take that property without providing at the same time and by the same act for the payment of just compensation. Some of the States, copying after this article, have gone further, and say without just compensation first paid or tendered. This provision, as it reads here, however, has been construed that the State can take the land and pay for it afterwards. But the general idea is, that whatever law or whatever mode of proceeding is adopted to take any private property, land, or personal property, for public use, the same law which authorizes it to be done must provide the mode of assessing its value and compensating the party for the property thus taken. This is one of the wise provisions of this instrument.

"In all criminal prosecutions the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law." Now notice. He shall have a *speedy* trial. It shall be a *public* trial, not a star-chamber proceeding, with closed doors, to keep the people from seeing what is being done. The man who is indicted or proceeded against for something which will affect his reputation, his life, his liberty, or his property, has the right to have the public look on and see how it is done; that all men may know that he gets justice and whether he is imposed upon. He is entitled to a speedy trial, not to be kept in prison year after year until it suits the pleasure of his prosecutor to move. He must have a speedy trial, and the courts are authorized, and ought, to discharge a man if he is kept in confinement longer than is reasonable. It must be a trial by an impartial jury. A jury means twelve men of the vicinage, and for that reason the amendment goes on to say that it shall be "by an impartial jury of the State and district wherein the crime shall have been committed." These refer to trials in the United States court, and but for this clause State lines need not be taken into account. But you shall not go out of the State; he shall have the jury summoned from the State and from a district within that State where the crime has been committed, and there he shall be taken and

tried where the transaction occurred. This district shall not be changed after the offense is committed so as to put him in an unfavorable district. But such district shall have been previously ascertained by law or previously fixed by an act of Congress, and there he shall be tried. Some States in my early days changed the venue by an act of the legislature, but that cannot be done here. He is to be informed of the nature and cause of the accusation; that is, if he is proceeded against by information, a copy shall be furnished him, and if by indictment, a copy shall also be furnished him. "He shall be confronted with the witnesses against him." If I had the time, I could show you how all of these provisions are jewels. He shall be confronted with the witnesses. You shall not take testimony five hundred miles away, but the witnesses shall confront him face to face; he shall look at them and have the opportunity of interrogating them in court. "To have compulsory process for obtaining witnesses in his favor." The United States shall give him a process—a process which shall not be disobeyed—a compulsory process for the witnesses that he wants. He may be the poorest man that ever lived, but if he has witnesses he has a right to a compulsory process for

their attendance in the courts of the United States, whatever it may be in other courts. "And to have the assistance of counsel for his defense." Now, you think that is quite an easy thing, because there are always lawyers enough, and that there is no need of having a provision for counsel. But up to the year 1836, in the liberal Government of Great Britain, which has prided itself upon the protection of the subject, no man indicted for treason was entitled to counsel at his trial; and up to perhaps 1789 or 1798—at all events, at the date of the formation of this Constitution—no man had a right to the assistance of counsel otherwise than that counsel might sit by and argue questions of law to the court, but had no right to interrogate the witnesses, or make speeches to the jury, or anything of that kind; and our ancestors saw the evil of that, and said that every man shall be entitled to have the assistance of counsel in his defense.

The more you examine that instrument, gentlemen, especially those portions of it concerning these subjects, the more you will see how carefully personal rights have been guarded by it. Another of these is, that

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

If the offense for which a man is held for trial is one of that character which is bailable at all in the courts of the United States, you are to regulate the bail according to his ability to give bail. Five or ten thousand dollars, reasonable to a man in easy circumstances, would be beyond the reach of another man who could give five hundred or a thousand dollars. That is the meaning of that clause; and as to cruel and unusual punishment, it means that you shall not cut off his ear, or burn him alive, and all that kind of thing.

The Constitution stood in that way on the subject of personal liberty and the personal rights of the citizen until the outbreak of the war of the Rebellion. The thirteenth amendment is one whose adoption is in the memory of almost every gentleman who is listening to me, and it will be one of the most memorable of all the amendments to that instrument. It was perhaps the most important of all the amendments, notwithstanding the great value of those which I have commented upon. It reads:

"That neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

There is a magnificent provision for the per-

sonal rights of man. There is to be no more slavery. Millions of people, by that simple provision, were translated from a condition of slavery equal to that of the most barbarous period that the ancient or the modern world has ever seen, to a condition of liberty, of manhood, of right. This is not the occasion, gentlemen, nor have I the time, to comment upon its importance.

The next is the fourteenth amendment. I have read to you one of its principal provisions. I will read them all:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

That is the first time in any constitutional provision, in any act of Congress, or in any authoritative form, that the word "citizen" was defined. You will find it all through the books, the speeches, the public discussions of every kind, but it was never defined authoritatively until it was defined here in this fourteenth amendment. Here you have a citizen of the United States and a citizen of the State in which a man resides. I cannot go into an explanation of that definition, but I refer you to the decision of the Supreme Court in the Slaughter-house Cases, in 16th Wallace, in

which you will find the construction which that court has given to these last three amendments.

After that it says:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Gentlemen, closing with that grand sentence, that there shall be no denial of the equal protection of the laws, permit me the further observation that this instrument, some fragmentary remarks on which I have been making to you on these three evenings, is an instrument deserving as sacred and profound reverence as the sacred books of the religions of the world, except the Bible. It is an instrument conceived in wisdom and forethought, adapted to the organization and perpetuity of government—adapted to the security of the rights of the citizen, of the individual. It is an instrument which has stood the progress of almost a hundred years, which has been tested by the events of those years, and its forecast and wisdom have shone brighter and brighter with every test that has been applied to it. It has withstood the shock of a war of national defense with Great Britain, of a war of conquest against

our neighbors, the Mexicans, and of a civil war such as never convulsed a nation on the face of the globe. In all this it has come out brighter and stronger; it has exhibited powers calculated for all emergencies; it has shown capacities for promoting the welfare of mankind—the happiness of the people subject to its dominion. There is no subject, gentlemen, to which you can give your study and your time, your care and industry, that will reward you better, either in your life as citizens, in your profession as lawyers, or as statesmen if you should become public men. There is none equal to that instrument of which, in these few evenings, I have attempted to say something in a very desultory way, and to which I have done but very poor justice. And if, gentlemen, you have been as much pleased in listening to these three discourses as I have been in delivering them, I shall have ample compensation for any trouble that I have been at. [Applause.]